

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

BRENDA MILLER,

Plaintiff-Appellant,

v

MATRIX SYSTEM AUTOMOTIVE FINISHES,  
INC.,

Defendant-Appellee.

---

UNPUBLISHED

May 30, 2006

No. 259226

Oakland Circuit Court

LC No. 2003-052196-NZ

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

In this action alleging sex (pregnancy) discrimination under the Civil Rights Act (CRA), MCL 37.2101 *et seq.*, plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm.

**I. FACTS**

This case arises out of the termination of plaintiff's employment in February 2003. Defendant hired plaintiff as a labeler in the production department at its facility on Martin Road in Walled Lake in approximately September 2002. At that time, defendant was relocating administrative operations, including its phone reception operation, to a facility on Ladd Road in Walled Lake. The relocation of those operations was still in progress in December 2002, when plaintiff decided that she could no longer perform the labeling job due to a spinal condition. The plant manager, Jerry Hall, granted plaintiff's request for an office position. Plaintiff's former supervisor, Linda Garris, completed a job status form indicating that plaintiff was assigned to a receptionist position at the Martin Road facility, effective December 23, 2002. At first, plaintiff primarily answered the telephone, directing the calls to whomever the caller needed to reach. When plaintiff was not answering the telephone, she assisted others, including Tracy Henson, a team member in the materials department. On February 7, 2003, plaintiff sent an email to coworkers informing them that she was pregnant. Plaintiff was discharged from her employment approximately two weeks later. Hall told plaintiff that her services were no longer needed.

Plaintiff brought this suit against defendant, alleging that she was discharged because of her pregnancy. In response to defendant's motion for summary disposition under MCR 2.116(C)(10), plaintiff claimed that she could establish a *prima facie* case of sex (pregnancy) discrimination based on defendant's alleged hiring of a nonpregnant woman, Colleen Kukla, to

replace her. After concluding that plaintiff and Kukla were not similarly situated and finding no indication that plaintiff was discharged because of her pregnancy, the trial court granted defendant's motion.

On appeal, plaintiff challenges the trial court's decision, claiming that she established a prima facie claim of sex (pregnancy) discrimination and retaliation under the CRA. Plaintiff has not briefed any retaliation claim, consequently, we deem this issue abandoned. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Limiting our review to the trial court's resolution of plaintiff's sex (pregnancy) discrimination claim, we hold that plaintiff has not established any basis for reversal.

## II. STANDARD OF REVIEW

We review de novo a trial court's decision to grant summary disposition. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). A motion under MCR 2.116(C)(10) tests the factual support of the claim. *Id.* The evidence offered in support of or in opposition to the motion is considered only to the extent that its content or substance would be admissible as evidence. MCR 2.116(G)(6); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). "After reviewing the evidence in a light most favorable to the nonmoving party, a trial court may grant summary disposition under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Hazle, supra* at 461.

## III. ANALYSIS

MCL 37.2202(1)(a) provides, in part, that an employer shall not "[f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . sex . . . ." The term "sex" is defined in the CRA as including pregnancy. MCL 37.2201(d); *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). Where, as in this case, the plaintiff relies on indirect or circumstantial evidence of pregnancy discrimination, a plaintiff may proceed under the burden-shifting approach set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski, supra* at 132-134; *Hazle, supra* at 462-463. This approach allows a plaintiff to present a rebuttable prima facie case on the basis of evidence from which a fact-finder could infer that she was the victim of unlawful discrimination. *Sniecinski, supra* at 134. The elements of the prima facie case should be tailored to fit the particular factual situation at hand. *Id.* at 134 n 7; *Hazle, supra* at 463 n 6.

Where a plaintiff presents a discriminatory replacement theory, an appropriate prima facie test may consist of a showing that (1) the plaintiff was a member of a protected class, (2) the plaintiff suffered an adverse employment action, (3) the plaintiff was qualified for the position, and (4) the plaintiff was replaced by an individual who was not a member of the protected class. See *Smith, supra* at 447; *Meagher v Wayne State Univ*, 222 Mich App 700, 711; 565 NW2d 401 (1997). Spreading former duties of a terminated worker amongst remaining employees does not constitute a replacement. *Majewski v Automatic Data Processing, Inc*, 274 F3d 1106 (CA 6, 2001). A person is replaced only if another employee is hired or reassigned to perform the plaintiff's duties. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 177-178; 579

NW2d 906 (1998) (opinion of Weaver, J); *Brocklehurst v PPG Industries, Inc*, 123 F3d 890, 895 (CA 6, 1997).

But the *McDonnell Douglas* prima facie test is applied with flexibility in reduction-in-force or structural reorganization cases so as to not require a showing that the plaintiff was replaced by a newly hired employee outside of his or her protected class. *Montana v First Fed S&L Ass'n of Rochester*, 869 F2d 100, 104-105 (CA 2, 1989). A true work force reduction occurs when an employer eliminates one or more positions in a company based on business considerations. *Lytle, supra* at 177-178 n 27. The distinction between a reduction-in-force situation and a replacement situation is an important one. Hence, in *Matras v Amoco Oil Co*, 424 Mich 675, 684; 385 NW2d 586 (1986), where an employee was discharged due to a reduction-in-force, our Supreme Court determined that a prima facie case required that the plaintiff present evidence on the ultimate issue whether the unlawful consideration was a determining factor in the discharge decision.

Plaintiff in this case proceeded on the theory that she was replaced by a nonpregnant woman, rather than a theory that she was treated differently than a similarly-situated nonpregnant individual, therefore, her reliance on the prima facie test applied to disparate treatment cases is misplaced.<sup>1</sup> Likewise, the trial court's analysis was incorrect to the extent that it considered plaintiff's discriminatory replacement theory under a disparate treatment test. But we will not reverse a trial court's decision when the court reaches the correct result regardless of the reasoning it employed. *Smith, supra* at 448.

---

<sup>1</sup> Where a plaintiff proceeds on a theory of disparate treatment, an appropriate prima facie test requires the plaintiff to show that she was “(1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct.” *Smith v Goodwill Industries of West Michigan, Inc*, 243 Mich App 438, 448; 622 NW2d 337 (2000), quoting *Town v Michigan Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997) (opinion by Brickley, J.). The plaintiff is required to show that all relevant aspects of the other individual's employment situation were nearly identical to those of the plaintiff's situation. *Smith, supra* at 449.

Here, we could uphold the trial court's decision on the basis that plaintiff has failed to support her argument that she was replaced by a nonpregnant woman with citations to the record, as required by MCR 7.212(C)(7). An appellant may not leave it to this Court to search the record for factual support for his or her claim. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004); *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).

But even if we were to address the merits of plaintiff's discriminatory replacement theory, we would not reverse because, viewed in a light most favorable to plaintiff, the evidence does not support a reasonable inference that defendant hired Kukla to perform plaintiff's duties. In this regard, we note that plaintiff offered no evidence that she filled an existing, as distinguished from a newly created, office position at the Martin Road facility in December 2002. Further, plaintiff did not rebut defendant's evidence that its plant manager, Hall, gave her an office position in conjunction with the relocation of defendant's administrative operations, including its phone reception operation, from the Martin Road facility to the Ladd Road facility. At most, plaintiff denied in deposition that Hall told her that the office position would end after the relocation of the administrative operations was completed. Plaintiff testified that she understood that her primary responsibility would be to answer the telephone, but that she could assist other employees when she was not answering the telephone. She understood that the employee who formerly answered the telephone at the Martin Road facility had already relocated to the Ladd Road facility, where plaintiff anticipated that most telephone calls would eventually be received. According to plaintiff, Hall stated "that he had a position up in the office at Martin Road, and that I would be answering telephones, assisting Tracy [Henson] with whatever she needed because she was so over-bombarded with work, and I would help anybody else that came to me for help including Kent Zimmerman and Dave Brunori and himself, Jerry [Hall]."

Further, while plaintiff testified in her deposition that Henson was training her for a new position, plaintiff offered no evidence of any offer made to her of a position with defendant, other than her assigned duties of answering the telephone and assisting others when she was not answering the telephone. We find nothing in plaintiff's deposition testimony or other proofs to rebut Henson's deposition testimony that Henson was instructed to keep plaintiff busy when she was not answering the telephone and, as part of this responsibility, trained plaintiff in some of her own job functions so that plaintiff could keep busy. Henson testified that plaintiff assisted her with some document control software that defendant no longer used. Additionally, while Henson testified that plaintiff did filing and some work involving batch ticket creation, requisition, and closing, she indicated that these were simple tasks that she would have performed if plaintiff was not present.

With regard to Kukla, the nonpregnant woman hired by defendant, plaintiff offered no evidence regarding the circumstances that led to defendant's decision to hire Kukla. Plaintiff relied on Henson's deposition testimony as factual support for her position that she was replaced by Kukla. Henson testified that she did not know exactly when Kukla was hired, other than that it was after plaintiff left. Henson did not participate in the hiring decision, but was aware that Kukla was hired as a team member for the materials department. She indicated that telephone calls for the Martin Road facility were answered at the Ladd Road facility when Kukla was hired. If Kukla answered the telephone, it was because someone called to speak with her. Henson claimed that she had very little involvement in training Kukla. She showed Kukla how

to do batch ticket closings and requisitions, but rarely saw Kukla perform these tasks. Henson indicated that Kukla may have done some filing, but that Kukla worked more with Steve Alfrey, the manager of the materials department, who trained Kukla for duties involving the purchase of raw materials and a “cycle count” inventory system. As part of the “cycle count” inventory system, Kukla was responsible for reconciling a computer-generated inventory report with actual inventory, a task that required lifting products from time to time. Alfrey performed these duties before Kukla was hired. Henson and Alfrey were the only group members in the material department before Kukla was hired.

It was incumbent on plaintiff to set forth specific facts showing a genuine issue of material fact for trial in response to defendant’s motion for summary disposition. *Maiden, supra* at 121. Viewed in a light most favorable to plaintiff, plaintiff failed to show a genuine issue of material fact with regard to whether she was replaced by Kukla. Unlike plaintiff’s job duties at the Martin Road facility, there was no evidence that Kukla’s job duties were to assist other employees and answer telephones. The evidence that Kukla was a team member in the materials department, with primary duties that included purchasing raw materials and inventory work, clearly distinguishes plaintiff’s position from Kukla’s position.

We hold that plaintiff failed to establish a prima facie case of pregnancy discrimination under her proposed discriminatory replacement theory and that defendant was entitled to summary disposition on this theory as a matter of law because plaintiff failed to show that she was replaced by Kukla. It was necessary that plaintiff present evidence that her pregnancy was a determining factor in defendant’s decision to eliminate her position because there was evidence that plaintiff’s position was eliminated, rather than plaintiff replaced. *Lytle, supra* at 177-178 n 27; *Matras, supra* at 684. Having considered the arguments presented by plaintiff on appeal regarding the issue of “pretext” in this context, we conclude that plaintiff failed to satisfy this burden.

In some circumstances, a plaintiff may create an inference of discrimination through evidence that an employer’s proffered reasons for an adverse employment action are false. *Town, supra* at 706. A “mere pretext” may be established by evidence that (1) the reasons have no basis in fact, (2) if the reasons have a basis in fact, they were not actual factors motivating the decision, or (3) if the reasons were not motivating factors, by showing that they were jointly insufficient to justify the decision. *Meagher, supra* at 712.

In this case, there was un rebutted evidence that defendant needed help answering the telephone at the Martin Road facility during the relocation process at about the same time that plaintiff requested an office position. Henson’s deposition testimony indicated that she answered the telephone before plaintiff was brought in to do so because the telephone was physically located in the materials department. Further, while plaintiff testified that she was not told that the office position would end after the relocation process was completed, plaintiff’s counsel stipulated that plaintiff was an at-will employee.

The only arguable basis in the record for inferring that plaintiff’s pregnancy was a determining factor in defendant’s decision to terminate her employment is the proximity in time between plaintiff’s announcement to coworkers on February 7, 2003 that she was pregnant and Hall’s decision to terminate her employment approximately two weeks later. But there was also a close proximity in time between plaintiff’s discharge and the completion of the telephone

transition to the Ladd Road facility, and plaintiff offered no evidence to rebut Hall's claim that the decision to eliminate plaintiff's position was made in conjunction with the completion of the telephone transition to the Ladd Road facility.

Any inference that Hall decided to discharge plaintiff because of her pregnancy would be mere conjecture and speculation based on the evidence offered in the trial court. Mere speculation or conjecture is insufficient to establish that an employer discharged an employee based on unlawful pregnancy animus. *Sniecinski, supra* at 140. Therefore, viewing plaintiff's claim as a reduction-in-force theory, rather than a replacement theory, plaintiff failed to introduce sufficient evidence to create a genuine issue of material fact with regard to whether pregnancy animus was a determining factor in the decision to terminate her employment. Therefore, the trial court reached the correct result in granting defendant's motion for summary disposition under MCR 2116(C)(10).

Affirmed.

/s/ Bill Schuette

/s/ Richard A. Bandstra